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No. 49

In the Supreme Court of the United States

OCTOBER TERM, 1928

LUCKENBACH STEAMSHIP COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

U.S. GOVERNMENT PRINTING OFFICE: 1929

INDEX

	Page
Opinion	1
Jurisdiction	1
Question presented	1
The statutes	2
The treaty	4
Statement	5
Argument:	
I. The Canal Zone with the exception of the cities of Panama and Colon and the harbors adjacent to said cities is a "possession" of the United States	8
II. The Postmaster General was not authorized by section 4009 of the Revised Statutes to pay the petitioner for the transportation of mails between ports of the United States and the Canal Zone the compensation prescribed for the transportation of mails between the United States and a foreign port	13
III. Section 4009, Revised Statutes, as amended by the Act of July 3, 1926, contains no provisions, either expressed or implied, which make it retroactive so as to authorize the Postmaster General to pay the compensation contended for by the petitioner for transporting mails between the United States and the Canal Zone during the period from December, 1925, to July, 1926, inclusive	16
IV. In the absence of a contract specifying the rates to be paid for the services, or of any evidence of the value of the services, the Court of Claims has correctly concluded that petitioner can not recover the amount claimed in this cause or any other sum	18
Conclusion	19

CITATIONS

Statutes:	
Act of April 28, 1904, c. 1758, 33 Stat. 429	9
Act of May 12, 1910, c. 230, 36 Stat. 355, 366 (U. S. C., Title 39, Sec. 421)	2
Revised Statutes, Sec. 4009 (U. S. C., Title 39, Sec. 654)	2
Act of July 3, 1926, c. 793, 44 Stat. 900 (U. S. C. app., Title 39, Sec. 654), amending Sec. 4009 R. S	3
Treaty:	
Treaty between the Republic of Panama and the United States, Arts. II, III, 33 Stat., pt. 2, 2234	4, 5

INDEX

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No. 764

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 12–26) has not been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered February 4, 1929. (R. 26.) The petition for writ of certiorari was filed March 12, 1929. Petitioner invokes the jurisdiction of this Court under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The sole question presented is whether for the transportation of mails between ports of the United States and the ports in the Canal Zone, that is, be-

tween New York City and Cristobal and/or Balboa, during the period from December, 1925, to June, 1926, inclusive, the petitioner was entitled to be paid at rates prescribed by the Postmaster General for the transportation of mails between the United States and a foreign port, or, to state it another way, whether the ports within the Panama Canal Zone were foreign ports within the meaning of Section 4009 Revised Statutes prior to its amendment by the Act of July 3, 1926.

THE STATUTES

The Act of May 12, 1910, c. 230, 36 Stat. 355, 366, contains the following provision:

> Hereafter the Postmaster General shall cause advertisements of all general mail lettings of each State and Territory to be conspicuously posted in each post office named in said advertisements for at least sixty days before the time of such general lettings, and no other advertisement of such lettings shall be required; but this provision shall not apply to any other than general mail lettings. (U. S. C., Title 39, Sec. 421.)

Section 4009, Revised Statutes, which authorizes the Postmaster General to pay for the transportation of mails between the United States and a foreign port, is as follows:

> For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign port, the Postmaster General may allow as compensation, if by a United States

steamship, any sum not exceeding the sea and United States inland postage; and if by a foreign steamship or by a sailing vessel, any sum not exceeding the sea postage, on the mail so transported. (U. S. C., Title 39, Sec. 654.)

Section 4009, Revised Statutes, was amended by the Act of July 3, 1926 (c. 793, 44 Stat. 900), to read as follows:

(a) Except as provided in subdivision (b), for transportation of the mails, (1) between the United States or its Territories or possessions and any foreign country, (2) between the United States and its possessions or its naval or military forces abroad, or (3) between any such possession or naval or military forces and any other such possession or naval or military forces, the Postmaster General may allow, in the case of a vessel of the United States, compensation not in excess of the amount of the postage collected on the mail transported on such vessel, and in the case of a foreign vessel compensation not in excess of the sea transit rates prescribed from time to time by the Universal Postal Union Convention.

(b) The provisions of subdivision (a) of this section shall not limit the compensation for transportation of mail which the Postmaster General may pay under contracts entered into in accordance with the provisions of section 4007 of the Revised Statutes or section 24 of the Merchant Marine Act, 1920.

(c) In the case of mails transported between the United States or its Territories or possessions and any foreign country and in the case of mails transported between the United States and its possessions or its naval or military forces abroad, or between any such possession or naval or military forces and any other such possession or naval or military forces, payment for such transportation shall be made out of the appropriation for the transportation of foreign mails. (U. S. C. App., Title 39, Sec. 654.)

THE TREATY

The material provisions of the Treaty with the Republic of Panama which granted to the United States perpetual possession and control of the Panama Canal Zone are as follows:

ARTICLE II

The Republic of Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the Canal to be constructed; the said zone beginning in the Carribbean Sea three marine miles from mean low-water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low-water mark with the proviso that the cities of Panama and Colon and the harbors adjacent

to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant. * * *

ARTICLE III

The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any of such sovereign rights, power or authority. (Treaties and Proclamations, 33 Stat. Pt. II, 2234; Treaties and Acts of Congress Relating to the Panama Canal, 1917.)

STATEMENT

This was a suit in the Court of Claims for the recovery of $30,370.94 which the petitioner claimed as the difference between the amount of compensation certified by the Postmaster General as due the petitioner for the transportation of various classes of mails of the United States between ports of the United States and the Canal Zone during the period December, 1925, to June, 1926, and the amount allowed and paid by the General Accounting Office for the same services. (R. 1, 4, 5–6, 7, 10–11.)

Up to December 1, 1925, the petitioner had transported mails of the United States between the United States and the Panama Canal Zone and had been paid for such services at rates approved by the Postmaster General for the transportation by United States steamships of mails *between the United States and a foreign port.* (R. 10.)

Petitioner also transported various classes of United States mail between the United States and the Panama Canal during the period December, 1925, to June, 1926, for which the Postmaster General approved vouchers aggregating the sum of $82,851.62 and transmitted the same to the General Accounting Office for direct settlement. (R. 10–11.) The accounts as approved by the Postmaster General were revised or reduced by the General Accounting Office and the petitioner was paid for said services only the sum of $52,480.68 allowed by the General Accounting Office, or $30,370.94 less than the amount approved by the Postmaster General. (R. 11.) The amount allowed and paid to petitioner was based upon the rate for the transportation by ocean transit of United States or foreign closed mails *between the United States and its possessions,* which, for the period involved, was to be fixed only by contract in accordance with law. In the absence of a contract covering the services for the period involved in this claim, it was held by the General Accounting Office that the petitioner was entitled to reasonable compensation only for

such transportation, which was determined by comparison with compensation paid under contracts for transportation of mails between the United States and its possessions to be $52,965.41. (R. 11.)

Since July 1, 1926, petitioner has transported mails of the United States on vessels of United States registry between ports of the United States and the Panama Canal Zone for which it has received payment at the rates prescribed by the Postmaster General for the transportation of mails on United States vessels between the ports of the United States and foreign ports, pursuant to the Act of July 3, 1926 (c. 793, 44 Stat. 900), which was construed as not being retroactive. (R. 11.)

If the mails transported by petitioner during the period from December, 1925, to June, 1926, inclusive, should be paid for at rates prescribed by the Postmaster General for the transportation of mails between ports of the United States and a foreign port prior to December, 1925, there is due the petitioner for the services performed during said period a balance of $30,370.94. (R. 12.)

The Court of Claims, in concluding that the petitioner was not entitled to recover, dismissed the petition (R. 12) and decided that (1) the Canal Zone under the Treaty with the Republic of Panama became and is a possession of the United States (R. 24); (2) an unauthorized and illegal practice prevailing among officers of the Government, no matter how long continued, can not ripen into a

binding usage (R. 24); (3) Section 4009, Revised Statutes, as amended by the Act of July 3, 1926, was not retroactive but was a declaration of a new purpose and not the explanation of an old one (R. 25); (4) in the absence of a contract entered into in accordance with statutory requirements, or any law specifically fixing the compensation for the services rendered by the petitioner, the only payment which may be authorized therefor is their reasonable value (R. 25–26).

ARGUMENT

I

THE CANAL ZONE, WITH THE EXCEPTION OF THE CITIES OF PANAMA AND COLON AND THE HARBORS ADJACENT TO SAID CITIES, IS A "POSSESSION" OF THE UNITED STATES

Under the provisions of the Treaty of February 26, 1904, between the Republic of Panama and the United States the Republic of Panama *granted* to the United States *in perpetuity* the use, occupation, and control of a strip of land and land under water ten miles wide across the Isthmus of Panama for the construction, maintenance, operation, sanitation, and protection of the Panama Canal; and also granted *all the rights, powers,* and *authority* within said zone which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located *to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority.* (R. 14–15.)

Ever since the Republic of Panama granted to the United States all the rights, power, and authority within the Canal Zone which the United States would possess and exercise if it were the sovereign thereof to the entire exclusion of the exercise by the Republic of Panama of any such *sovereign rights*, power, or authority in said zone, the executive branch of the Government of the United States has always exercised and is now exercising all the rights, power, and authority of sovereignty in the Canal Zone as are now being possessed and exercised in all other territory or possessions which are under the control and jurisdiction of the United States. (R. 15–18.)

After the ratification of the Treaty, the President of the United States was authorized by the Act of April 28, 1904 (c. 1758, 33 Stat. 429), to take possession of and occupy on behalf of the United States the zone of land granted by the Republic of Panama. (R. 15.) Acting under the authority of said Act, the President by Executive Order of May 9, 1904, took possession of and occupied "on behalf of the United States, the Canal Zone and public land ceded by the Republic of Panama," and directed the Isthmian Canal Commission to enact a code of laws for the government of the Canal Zone, and specifically a law annulling any franchise which granted to any person the privilege of maintaining lotteries or any other gambling devices forbidden by the laws of the United States

and punishing the future exercise of the same by imprisonment or fine, or both. (R. 15–16.)

Ever since the United States was granted the perpetual use, occupation, and control of the Canal Zone, and acquired all the rights, power, and authority of sovereignty to the entire exclusion of the exercise thereof by the Republic of Panama, the Canal Zone has been considered and treated by the legislative branch of the Government as a "territory" or "possession" of the United States. (R. 18–21.)

Notwithstanding the rights, power, and authority granted to and exercised by the United States, petitioner contends here, as it did in the Court of Claims, that "the Canal Zone and its ports and harbors come within the designation of a 'foreign' port as defined by Section 4009 of the Revised Statutes." (Brief, p. 1.)

This contention was completely disposed of in the opinion of the Court of Claims, where it was said (R. 21):

> The plaintiff's contention that "The Canal Zone is no part of the United States," but that it is "foreign" within the meaning and intent of the laws of the United States, is not supported by the provisions of Articles II and III of the treaty between the United States and the Republic of Panama.
>
> The treaty under which the United States acquired in perpetuity the use, occupation, and control of the Canal Zone, granted to and vested in the United States forever all

the rights, power, and authority in and over said strip of land and lands under water which it could possess as the sovereign thereof to the entire exclusion of the exercise of any such sovereign rights, powers, and authority thereover by the Republic of Panama.

A grant, as used in a treaty, comprehends not only those concessions which are made in form but also any concession, warrant, order, or permission to survey, possess, or settle, whether evidenced by writing or parol, or presumed from possession. (*Strother* v. *Lucas,* 12 Pet. 410, 435; *Bryant* v. *Kennett,* 113 U. S. 179, 192.)

A grant in its own nature amounts to an extinguishment of the rights of the grantor, and implies a contract not to reassert those rights. (*State of Illinois* v. *Illinois Central Railroad Company,* 33 Fed. 730–774.)

In all governments of constitutional limitations sovereign power is manifested in three ways: (1) By exercising the right of taxation; (2) by exercising the right of eminent domain; (3) through its police powers. It has been shown that all of these powers have been exercised by the executive and legislative branches of the Federal Government, and *the question of whether or not the Canal Zone is a possession of the United States has been definitely determined and the courts are bound by that determination.* (Italics ours.)

In its further discussion of the character of the title which the Republic of Panama granted to the United States in and to the Canal Zone, the Court of Claims finally concluded (R. 23):

> We think that it must be admitted that all doubt as to the character of the title of the United States in and to the Canal Zone has been conclusively removed by the decision of the Supreme Court in the case of *Wilson* v. *Shaw*, 204 U. S. 24, where it was contended that the United States had no power to construct the Panama Canal because the Canal Zone was no part of the territory of the United States. Mr. Justice Brewer, speaking for the Court (pp. 32 and 33), said:
>
> "Another contention, in support of which plaintiff has presented a voluminous argument, is that the United States has no power to engage in the work of digging this canal. His first proposition is that the Canal Zone is no part of the territory of the United States, and that, therefore, the Government is powerless to do anything of the kind therein. Article 2 of the treaty, heretofore referred to, 'grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the construction, maintenance, operation, sanitation, and protection of said canal.' By Article 3, Panama 'grants to the United States all the rights, power, and authority within the zone mentioned and described in Article 2 of this

agreement, * * * which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority.'

"Other provisions of the treaty add to the grants named in these two articles further guaranties of exclusive rights of the United States in the construction and maintenance of the Canal. *It is hypercritical to contend that the title of the United States is imperfect, and that the territory described does not belong to this Nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate.*" (Italics ours.)

II

THE POSTMASTER GENERAL WAS NOT AUTHORIZED BY SECTION 4009 OF THE REVISED STATUTES TO PAY THE PETITIONER FOR THE TRANSPORTATION OF MAILS BETWEEN PORTS OF THE UNITED STATES AND THE CANAL ZONE THE COMPENSATION PRESCRIBED FOR THE TRANSPORTATION OF MAILS BETWEEN THE UNITED STATES AND A FOREIGN PORT

The petitioner in effect contends that regardless of whether the Canal Zone is considered "foreign territory" or a "possession" of the United States, the mere fact that certain officers of the Government have considered and treated the Canal Zone as "foreign territory," and the Postmaster

General, acting under Section 4009, has approved its accounts for payment on that basis for many years up to December, 1925, "should be determinative against a sudden departure from that rule made by the General Accounting Office in opposition to the views of the Postmaster General." (Brief, p. 5.)

We think that this contention of the petitioner was correctly disposed of by the Court of Claims when it said (R. 24) that—

> It is clear from what has been before stated that the Canal Zone under the treaty with the Republic of Panama became and is a possession of the United States, which has always exercised and is now exercising all the powers and rights of sovereignty in the Canal Zone as are being exercised in all of the territory or possessions which are under the control and jurisdiction of the United States, and that ever since it was acquired the Canal Zone has been considered and treated by the legislative branch of the Government as a possession of the United States, and that therefore the Postmaster General was not authorized to pay compensation based upon rates applicable to transportation of mails between the United States and a foreign port, under section 4009, supra, of the Revised Statutes.
>
> The plaintiff further contends that because the Postmaster General for a long time prior to December 1, 1925, had construed section 4009, Revised Statutes, as giv-

ing him authority to pay for the transportation of mails between the United States and the Canal Zone the same compensation provided for in said statute for the transportation of mails between the United States and a foreign port, such construction should not now be disturbed, "especially when so to do would savor of bad faith and a violation of contract rights." We think the answer to this contention is that an unauthorized and illegal practice prevailing among officers of the Government, no matter how long continued, can never ripen into a binding usage. (*Pierce* v. *United States,* 1 C. Cls. 270; *The Floyd Acceptances,* 7 Wall. 666.) In the case of *Houghton* v. *Payne,* 194 U. S. 88, it is stated (pp. 99–100) that—

" * * * it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. *United States* v. *Graham,* 110 U. S. 219; *United States* v. *Finnell,* 185 U. S. 236. Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the department, however long continued by successive officers, must yield to the positive language of the statute."

III

SECTION 4009, REVISED STATUTES, AS AMENDED BY THE ACT OF JULY 3, 1926, CONTAINS NO PROVISIONS, EITHER EXPRESSED OR IMPLIED, WHICH MAKE IT RETROACTIVE SO AS TO AUTHORIZE THE POSTMASTER GENERAL TO PAY THE COMPENSATION CONTENDED FOR BY THE PETITIONER FOR TRANSPORTING MAILS BETWEEN THE UNITED STATES AND THE CANAL ZONE DURING THE PERIOD FROM DECEMBER, 1925, TO JULY, 1926, INCLUSIVE

In overruling the petitioner's contention (R. 2, Brief, p. 2) that the Act of July 3, 1926, amending Section 4009, Revised Statutes, "so as to allow compensation as herein claimed for services in such transportation of mails not only made law for the future, but was a declaratory statute intended to confirm the long-standing construction of Section 4009 of the Revised Statutes by the Post Office Department," the Court of Claims said (R. 25):

> Section 4009 of the Revised Statutes was amended by the act of July 3, 1926. (44 Stat. 900.) Plaintiff contends that the above act, amending section 4009, Revised Statutes, should be construed as a declaratory statute, making clear the meaning of section 4009, Revised Statutes. In other words, that the amendatory act was retroactive. It is well settled that statutes are not to be given a retroactive effect unless the legislative purpose so to do plainly appears. *United States* v. *Magnolia Petroleum Company,* decided February 20, 1928, 276 U. S. 160, wherein the Court said:

"Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."

Also in *White* v. *United States,* 191 U. S. 545, wherein it is said:

"Where it is claimed that a law is to have a retrospective operation, such must be clearly the intention, evidenced in the law and its purposes, or the court will presume that the lawmaking power is acting for the future only and not for the past; that it is enacting a rule of conduct which shall control the future rights and dealings of men rather than review and affix new obligations to that which has been done in the past."

We can not accept the explanation that the act of July 3, 1926, supra, amending section 4009 of the Revised Statutes, was an elucidation of said section, and not an addition to it, as claimed by defendant (plaintiff), but we regard it as a declaration of a new purpose and not the explanation of an old one. Our view is that the amendatory act makes specific provision for the casus omissus in said section 4009, Revised Statutes. (See *Smietanka* v. *First Trust & Savgs. Bank,* 257 U. S. 602; also *Shwab* v. *Doyle,* 258 U. S. 529.

IV

IN THE ABSENCE OF A CONTRACT SPECIFYING THE RATES TO BE PAID FOR THE SERVICES, OR OF ANY EVIDENCE OF THE VALUE OF THE SERVICES, THE COURT OF CLAIMS HAS CORRECTLY CONCLUDED THAT PETITIONER CAN NOT RECOVER THE AMOUNT CLAIMED IN THIS CAUSE OR ANY OTHER SUM

The petitioner contends here as it did in the Court of Claims that "the approval by the Postmaster General of accounts for carrying the mails is conclusive upon the accounting officers and the courts," especially in the absence of any evidence contradicting the same. (Pet., p. 2.)

The Court of Claims was correct in its disposition of this contention when it said (R. 25–26):

> Prior to July 3, 1926, the compensation for transporting the mail between the United States and its possessions was required to be fixed by contractual agreement. In the absence of such a contract entered into in accordance with statutory requirements, or any law specifically fixing the compensation for such service, it is evident that the only payment which may be authorized for the services is their reasonable value. The plaintiff has not seen fit to offer any evidence to prove that the amount allowed and paid by the General Accounting Office for the services is not reasonable in comparison with the compensation fixed in contracts for a similar service. In the absence of proof that the services were worth more than has been paid therefor the plaintiff

can not recover the amount claimed in this case or any other sum.

CONCLUSION

This case presents no question of general importance; it depends upon its own peculiar facts, a decision on which would have no value whatever as a precedent because Section 4009, Revised Statutes, as amended by the Act of July 3, 1926, authorizes the Postmaster General to pay the rates contended for by the petitioner. The Court of Claims has correctly decided the question in accordance with the facts and the decisions of this Court, and no useful purpose would be served by issuing the writ. The petition for certiorari should therefore be denied.

Respectfully submitted.

WILLIAM D. MITCHELL,
Attorney General.
HERMAN J. GALLOWAY,
Assistant Attorney General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
LOUIS R. MEHLINGER,
Attorney.

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